U.S. Department of Labor

Office of Administrative Law Judges 1111 20th Street, N.W. Washington, D.C. 20036



IN THE MATTER of'

U.S. DEPARTMENT OF LABOR

Appellee-Plaintiff

V.

CASE NO. 84-JTP-16

THE SANTEE SIOUX TRIBE OF NEBRASKA : Appellant-Respondent:

Louise L. Cavanaugh, Esquire

For the Plaintiff

John M. Peebles, Esquire

For the Respondent

Before: WILLIAM H. DAPPER

Administrative Law Judge

DECISION AND ORDER

This case arises under the Job Training Partnership Act of 1982, 29 U.S.C. 91501 et seq. (hereinafter the "Act" or "JTPA"), and the rules and-regulations issued thereunder in Title 20 of the Code of Federal Regulations, Part 626 through 636.

The Act is designed to establish programs to prepare youth and unskilled adults for entry into the labor force and afford job training to those economically disadvantaged individuals and others facing serious barriers to employment who are in special need of such training to obtain productive employment. (20 C.F.R. \$626.1) The purpose of grants issued pursuant to Title IV, Part A, Section 401 of the Act is to provide job training and employment activities for Native Americans. The Department is instructed under 20 C.F.R. \$632.170 to provide funds only to Native American grantees as defined in 20 C.F.R. \$632.10 and designated in accordance with that regulation.

The appellant, the Santee Sioux Tribe of Nebraska (hereinafter the "Tribe") is appealing the Grant Officer's decision denying the Tribe's designation as a grantee for the program year 1984 Native American grant. Both parties have filed motions for summary judgment asserting that there is no genuine issue as to any material fact and that judgment can and should be rendered on the merits without an evidentiary hearing.

As discussed in detail below, it is concluded that summary judgment is warranted in this matter and that the Grant Officer's decision should be affirmed.

The-Department of Labor has the burden of production to support the Grant Officer's decision. This requires the preparation and submission of an administrative file 1/ in support of the decision. The Department of Labor has met that burden. Thereafter, the party seeking to overturn the Grant Officer's decision has the burden of persuasion. (20 C.F.R. 636.10(g)) The standard employed upon review is to determine from the record whether there exists reliable and probative evidence to uphold the decision of the Grant Officer. (20 C.F.R. 636.10(h)(1))

Before ruling on the motions, a brief review of the pertinent procedural history of this litigation is warranted. On May 17, 1984, the Grant Officer denied the Tribe designation as a Native American grantee for program year 1984 and informed the Tribe that steps were being taken to secure an alternative service deliverer in accordance with 20 C.F.R. (AF 14) On June 20, 1984, the Tribe filed a petition for reconsideration pursuant to 20 C.F.R. \$632.13. (AF 10-12) On July 19, 1984, the Grant Officer denied the Tribe's petition for reconsideration based upon the fact that the Tribe had failed to satisfy outstanding Comprehensive Employment and Training Act (hereinafter "CETA") debts or arrange a satissfactory repayment agreement. (AF 6-7) On August 8, 1984, the Tribe filed a request for a hearing pursuant to 20 C.F.R. \$636.10, along with a motion for stay of withdrawal of designation as a program year 1984 Native American grantee. Thereafter, on December 21, 1984, the Grant Officer filed a motion for summary judgment, or in the alternative, a motion in opposition to the appellant's motion for a stay. On February 15, 1985, the Tribe also filed a motion for summary judgment. Thereafter, on February 28, 1985, the Grant Officer filed a response to the Tribe's motion for summary judgment and motion for stay.

Findings of Fact and Conclusions of Law

Under Rule 56 of the Federal Rules of Procedure, and corresponding regulations applicable to this proceeding, 29 C.F.R. §§18.40 and 18.41, a motion for summary judgment will not lie unless there is no genuine issue as to any material fact. By filing their respective motions for summary judgment, both parties necessarily assert that there is no genuine issue of material fact to be decided and, thus, there is no need for an evidentiary hearing. After consideration of the pleadings,

<u>1</u>/ "AF" used hereinafter refers to the administrative file which was submitted by the Grant Officer to this Office on December 6, 1984.

the administrative file, and all other documents submitted in this case, the Court agrees with the parties that there are no genuine issues as to any material fact and thus it is appropriate to proceed to decision on the merits of this matter. $\underline{\mathbf{2}}/$

The facts of this case are as follows: the Tribe received two grants from the Department of Labor, the first in 1975 and the second in 1976, pursuant to the Comprehensive Employment and Training Act, as amended, 29 U.S.C. \$801. After an audit investigation by the Department in 1980, the Grant Officer made initial determinations disallowing costs for the 1975 grant in the amount of \$13,114, and for the 1976 grant in the amount of \$43,526. (AF 120-126) During the subsequent 30-day period provided for possible informal resolution, the Grant Officer reviewed the documents submitted by the Tribe On July 25, 1980 and August 4, 1980, the in their defense. Grant Officer issued final determinations reaffirming the disallowed costs calculated in the initial determinations and requesting repayment. (AF 111-119) In accordance with 20 C.F.R. \$676.88, the Tribe was provided an opportunity to request a hearing on the final determinations. The Tribe failed, however, to utilize this authorized appeal procedure and the debts established by the final determinations evolved into legal claims subject to enforced collection action. 109-110) Subsequently, the Department of Labor issued three letters demanding repayment of the debts. (AF 97-102, 107-110) On January 28, 1981, the Tribe proffered a check to the Department in the amount of \$583.66 along with a letter explaining why they believed this was the amount actually owed and asking the Department to accept that amount as total payment. In a letter dated March 4, 1981, the Grant (AF 103-104) Officer advised the Tribe that the check had been processed and applied against the outstanding debt owed and demanded repayment on the remaining debt. (AF 94-96) On June 29, 1982, the Tribe sent a letter to the Department indicating its intention to pay all outstanding debts. (AF 92) Following this letter, a number of repayment plans were proposed or rejected by both sides. Specifically, the Department rejected as unacceptable both of the special noncash repayment agreements proffered by the Tribe. (AF 51-56; Exhibit B)

Thereafter, On August 25, 1983, the Tribe was conditionally designated as a Native American grantee for program year 1984 pursuant to the provisions of Section 401, Part A of the

^{2/} The evidentiary record in this matter consists of the administrative file which is marked for identification as described in the index to the file plus the three letters attached to the Tribe's February 15, 1985 motion for summary judgment which are marked as Tribe Exhibits A, B and **C.** The administrative file and the three letters are received in evidence.

Act. (AF 15-40) The designation was made conditional upon resolution of the two outstanding CETA debts. The Tribe and the Department failed to come to terms agreeable to both sides concerning the proper resolution of the debts. Such failure led to the Grant Officer's determination denying the Tribe designation as a grantee. (AF 13-14) It is from such decision that the Tribe makes its present appeal. (AF 5)

The specific issue before this Court is whether the Grant Officer properly denied the Tribe designation as program year 1984 Native American grantee. The Grant Officer's denial was based upon a determination that the Tribe failed to resolve two outstanding debts existing from prior year Native American CETA programs. (AF 6-7, 14-40)

In reviewing the Grant Officer's determination, the first step is to examine the regulatory framework within which the Department must operate. Under 20 C.F.R. \$632.170, the Department is instructed to provide funds only to Native American grantees designated in accordance with 20 C.F.R. Section 632.10 sets forth specific eligibility requirements which an applicant must satisfy to be designated a grantee. Section 632.10(b) provides that in order for an applicant to be designated, it must have the "capability to administer an Indian and Native American employment and training program, defined further on as meaning, inter alia, an "ability to properly administer government funds." 632.10(c) further provides that: "[t]heDepartment will not designate an organization in cases where it is established that (1) the agency's efforts to recover debts (for which three demand letters have been sent) established by final agency action have been unsuccessful." The Grant Officerf apparently relied specifically upon 20 C.F.R. §632.10(c) as his authority to deny the Tribe designation as a grantee.

The initial question for determination is whether there are outstanding debts owed by the Tribe which were established by final agency action. The facts of record are clear in this regard. A final determination was issued by the Grant Officer with regard to both the 1975 and 1976 CETA grants affirming the initial determinations concerning disallowed costs and requesting repayment. The Tribe, although provided with an opportunity to request a hearing on such final determination, failed to do so. The applicable regulation specifically directs that: "those provisions of the determination not specified for hearing or the entire determination when no hearing has been requested shall be considered resolved and not subject to further review." (20 C.F.R. \$676.88(f)) (Emphasis added) Thus, the Tribe's arguments attacking the validity of the Grant Officer's final determination disallowing

CETA costs and requesting repayment are untimely and inappropriate in this forum. 3/ Such arguments should have been raised at a hearing following the final determination. A hearing was not requested by the Tribe and the Grant Officer's final determination is no longer subject to review. In view of the foregoing facts, it is concluded that there are outstanding debts owed by the Tribe which were established by final agency action.

The next question for determination is whether the Department's efforts to recover such established debts have been unsuccessful, i.e., whether the debt remains unresolved. record reveals that after the third and final demand letters were sent out on February 9, 1981 (AF 97-102), the Tribe sent a letter to the Department indicating its intention to pay all outstanding debts (AF 92). On July 27, 1983, the Tribe sent the Department a special noncash repayment agreement which the Tribe had executed. Such agreement, however, failed to acknowledge and to assure repayment of approximately \$50,000 of remaining debt in whole or in part during 1984. Therefore, the Tribe's proposed repayment plan failed to satisfy the Department's requirement that the remainder of the debt be Thus, the Department disapproved the agreement. paid in 1984. (AF 51-52) A second special noncash repayment agreement was executed by the Tribe on February 21, 1984 (Exhibit A). The Department, at this juncture, was no longer willing to accept a totally noncash agreement and required at least 30-40 percent in cash as part of any settlement. This position was clearly transmitted to the Tribe during the course of a January 12, 1984 telephone conference call. (Exhibit B) No further attempts at resolution of the debts were proffered by the Tribe.

The Tribe argues that the Department's efforts to recover the debt have not been unsuccessful. Evidence of this is the fact that two special noncash agreements were proffered by the Tribe. The Tribe contends that "the Department through its vacillation has prevented the effort of recovery of any money." (Appellant's Motion for Summary Judgment, p. 7) This contention is without merit. The Department has the authority to negotiate appropriate methods of repayment and it is within its discretion to determine what is an acceptable repayment plan. In the instant situation, the two agreements proposed by the Tribe were considered unacceptable by the Department and the reasons therefor were clearly delineated

 $\overline{3/}$ The Tribe argues that the Grant Officer's decision was in Violation of 29 U.S.C. \$816(d)(2) in that it failed to set forth reasons for choosing the corrective action of repayment as opposed to other possible sanctions or corrective actions which might have been more appropriate. The Tribe also argues that the CETA does not provide the **Department with** the authority to seek repayment of the grants at issue here.

in response letters. (AF 51-56; Exhibit B) These reasons, stated above, articulate satisfactory explanations for non-acceptance of the agreements. The Grant Officer is under no mandate to accept whatever proposed repayment agreement is proffered, regardless of terms. Thus, it is concluded that the Grant Officer acted within his discretion and that the Department's efforts to recover the established debts were unsuccessful. 4/

The Tribe also argues that the Department's acceptance of the January 28, 1981 check in the amount of \$583.66 acted as an accord and satisfaction of the debt. This contention is without merit. In the letter accompanying the check, the Tribe "asks" that the Department accept the check as total (AF 103-104) The Department responded on March 4, 1981 informing the Tribe that the amount tendered would be applied against the outstanding debt. (AF 94-96) The Tribe never replied to the Department's determination to apply the check sum as partial payment. Indeed, the Tribe later indicated its intention to pay its outstanding debts. Thus, it is clear that the Department had no intention of accepting the lesser amount in full satisfaction of the debt and there was never a meeting of the minds in this regard. Moreover, a valid accord and satisfaction exists only in situations where there is a dispute as to the amount due. The debt in the instant situation was established by final agency action and had evolved into a legal claim subject to collection action. Thus, the amount was not in dispute. It is therefore clear that the payment at issue here did not constitute a full accord and satisfaction.

The final question for determination is whether the Grant Officer has the regulatory authority to rely on debts incurred under the CETA in order to refuse to designate a grantee under the JTPA. While there is no provision in the Act which specifically addresses this question, the Act recognizes the continuing viability of determinations made under the CETA. See 29 U.S.C. \$1591(d). Since the Act by its terms provides that the CETA determinations (issued prior to September 30, 1983) shall continue in effect, it is consistent with the statutory scheme to include within the sphere of "debts established by final agency action," those debts established under prior CETA determinations. Moreover, it must be recognized that the JTPA is, in essence, the successor statute to the CETA, albeit at a different (usually lower) funding level. Thus, the type of grant program involved herein is essentially the same type of grant program administered under the CETA. In this context, the two statutes involve similar, if not identical, activities.

^{4/} It is noted that the Department proposed an installment repayment agreement which the Tribe never addressed. (AF 51-86).

The CETA has, of course, been repealed. The Department is not proceeding, however, in terms of the grant authority at issue herein, under the CETA and the sole question is whether in taking action under the JTPA the Department may properly consider prior behavior by this applicant under the CETA. Given the fact that the two statutes provided (in the context being considered herein) for funding of the same type of program, it is reasonable to conclude that a potential grantee's past history in administering such a program would be relevant.

ORDER

IT IS THEREFORE ORDERED THAT:

The Department of Labor's motion for summary judgment is GRANTED; the Santee Sioux Tribe's motion for summary judgment is DENIED; and the decision of the Grant Officer denying designation of the Tribe as a grantee for the program year 1984 Native American grant be and it hereby is AFFIRMED.

WILLIAM H. DAPPER

MAY 241985

Dated: Washington, D.C.

WHD/paw

Administrative Law Judge

SERVICE SHEET

CASE NAME: U.S. Department of Labor v. The Santee Sioux Tribe

of Nebraska

CASE NO.: 84-JTP-16

TITLE OF DOCUMENT: DECISION AND ORDER

A copy of the above document was sent t&h following

MAY 241985

Mr. John M. Pebbles, Esquire Peebles & Smith P.O. Box 304 Niobrara, NE 68760

Mr. Edward A. Tomchick Grant Officer Office of Acquisition and Assistance Employment and Training Administration U.S. Department of Labor 601 D Street, N.W. Washington, D.C. 20213

Mr. Douglas Cochennour Contract/Grant Officer Chief, Division of Financial Policy, Audit and Closeout Employment and Training Administration U.S. Department of Labor 600 D Street, N.W., Room 5106 Washington, D.C. 20213 Washington, D.C.

David 0. Williams, Esquire office of the Special Counsel Employment and Training Administration U.S. Department of Labor 601 D Street, N.W. Washington, D.C. 20213

Mr. William H. DuRoss, III Associate Solicitor for Employment and Training Legal Services Office of the Solicitor U.S. Department of Labor 200 Constitution Avenue, N.W. Room N2101-FPB Washington, D.C. 20210

Mr. Jonathan H. Waxman Counsel for Litigation
Division of Employment and
Training Legal Services Office of the Solicitor U.S. Department of Labor 200 Constitution Avenue, N.W. Room N2101-FPB Washington, D.C. 20210

Louise L. Cavanaugh, Esquire Office of the Solicitor U.S. Department of Labor 200 Constitution Avenue, N.W. Room N2101-FPB Washington, D.C. 20210

Mr. Tedrick A. Housh, Jr. Regional Solicitor Office of the Solicitor U.S. Department of Labor 911 Walnut Street Kansas City, MO 64106